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No. 82-1300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA STATE BAR, et al.,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC. et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

Did the Court of Appeals properly reverse a District Court ruling that it would be manifestly unjust to award attorneys fees under 42 U.S.C. Section 1988 against a state bar association that proposed and enforced an unconstitutional code, when the District Court decision was based entirely on a bar proposal to amend the code, submitted a year after the suit was filed, which would not have protected the constitutional rights vindicated in the suit?

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Consumers Union of United States, Inc. and Virginia Citizens Consumer Council, Inc ("Consumers Union")[1] oppose the petition for a writ of certiorari filed by the Virginia State Bar, et al. ("Bar"). Consumers Union's entitlement to reimbursement for its attorneys' fees under 42 U.S.C. Section 1988, having been correctly decided by the Court of Appeals, does not raise any questions which deserve plenary consideration by this Court.

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[1]Consumers Union Foundation, Inc. may be an affiliate of Consumers Union of United States, Inc. and Virginia Citizens Consumers Council Fund, Inc. may be an affiliate of Virginia Citizens Consumer Council, Inc. under Rule 28.1.

I.

STATEMENT OF THE CASE

In 1974, Consumers Union attempted to publish an attorney directory for Arlington, Virginia, with information about lawyers' backgrounds, areas of legal practice, types of clientele, billing practices and fees. The Virginia Code of Professional Responsibility, Rule 2-102(A)(6), prohibited lawyers from participating in such a directory. The Virginia Bar, on April 1, 1971, had petitioned the Supreme Court of Virginia ("Virginia Court") to adopt that Rule and the Virginia Court had acted favorably on the Bar's petition.

Consumers Union sought a formal ruling from the Bar certifying its attorney directory as a "reputable publication" in which attorneys could participate without being subject to disciplinary action under the Rule; Consumers Union did not receive a response. An Arlington County attorney then wrote to the Bar asking if she could give Consumers Union information for the directory and the Bar informed her that the Rule did not permit attorneys to do so.

Consumers Union filed this action in 1975 against the Bar, Virginia Court and others. The complaint sought declaratory relief pronouncing the Rule unconstitutional and upholding the constitutional right of Consumers Union to gather information from attorneys and to publish the directory. The complaint further sought a permanent injunction enjoining the defendants from enforcing the Rule, costs and reasonable counsel fees.

During the course of this litigation, the District Court delayed the proceeding three times, despite Consumers

Union's objections, to allow the defendants to amend the Rule. In February, 1976, the American Bar Association revised its Code of Professional Responsibility to permit publication of a few additional categories of information about lawyers.

On April 6, 1976, the Bar recommended a Rule change similar to, but more limited than, the amendments just adopted by the ABA. The Bar proposal, if adopted, would not have permitted attorneys to participate in Consumers Union's directory, since the directory was to include such information as attorney fees for routine legal services, types of clientele and types of cases handled in the past. The Virginia Court later characterized that bar proposal as "a reflexive response to the ABA's actions . . . submitted without supporting documentation . . . [that] did not satisfy the test laid down a year later in *Bates*." The Virginia Court, on April 20, 1976, refused to adopt the Bar's proposal, stating that this change would "not serve the best interests of the public or legal profession."

On May 7, 1979, a three-judge District Court held the Rule to be unconstitutional on its face and publication of the entire directory to be constitutionally protected. It also permanently enjoined the Bar and Virginia Court from enforcing the Rule. Since Consumers Union had prevailed, the District Court concluded that it was entitled to reimbursement for its attorneys fees and costs under 42 U.S.C. Section 1988, unless special circumstances would render an award unjust. The District Court then awarded fees and costs against the Virginia Court. However, it concluded that an award against the Bar would be unjust because the Bar had petitioned the Virginia Court on April 1, 1976 to amend the Rule, but had lacked the authority to implement the proposed changes.

On June 2, 1980, the Supreme Court upheld the judgment and injunction entered against the Virginia Court in its enforcement role. However, the Supreme Court vacated the fee awarded entered against the Virginia Court because the award was premised on legislative decisions which were immune from legal challenge. The Supreme Court noted that fees could be awarded against the Virginia Court in its enforcement role, and remanded the case for further proceedings consistent with its opinion. *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719 (1980).

The Supreme Court further stated that it was not convinced an award of fees against the Bar would be unjust, unless special circumstances existed that were not disclosed in the record. The Court noted that fees are routinely awarded against enforcement officials even though, had a state legislature acted or reacted differently, the suit would have been unnecessary. *Id.* at 739. On June 9, 1980, the Supreme Court vacated the decision not to award fees and costs against the Bar and remanded the case for reconsideration in light of *Supreme Court of Virginia* v. *Consumers Union, supra. Consumers Union* v. *Virginia State Bar,* 447 U.S. 901 (1980).

On January 8, 1981, the District Court held Consumers Union to be entitled to reimbursement for its fees and costs from the Virginia Court, in its enforcement role. However, the District Court released the Bar from liability for fees stating "[a]s before, this conclusion is grounded on the Bar's endeavors to have the Bar Code amended to conform to constitutional standards." *Consumers Union* v. *American Bar Association,* 505 F.Supp. 822 (E.D. Va. 1981). The Court of Appeals overturned the decision not to award fees against the Bar. It noted that the Supreme

Court had based its approval of a fee award in this case on the Virginia Court's enforcement role, rather than its promulgation of the Rule. Since the Bar played an equally significant and closely interrelated enforcement role, the Court of Appeals ruled that an award should have been granted based on the Bar's enforcement function. Because that fee award would not be premised on the legislative decision to issue or retain the Rule, the Bar's efforts to influence that decision did not render the award unjust.

The Court of Appeals further concluded that these efforts could not cause an award to be unjust since the Bar made its proposals only after this lawsuit was instituted and, even then, proposed amendments that would have continued to infringe on plaintiffs' First Amendment rights.

III.

ARGUMENT

Through this litigation, Consumers Union vindicated from infringement by the Bar the First Amendment rights of consumers to receive factual information on available legal services. It eliminated barriers to the flow of vitally needed, constitutionally protected information and conferred sweeping public benefits on consumers throughout Virginia.

As a prevailing private attorney general, Consumers Union is entitled to an award of fees and costs from the Bar under 42 U.S.C. Section 1988, unless special circumstances exist that would render an award unjust. *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. at 737-738. A strong presumption in favor of granting awards is embodied in Section 1988 to encourage private

attorneys general to bring litigation, such as this case, that protects constitutional rights and confers broad public benefits. Special circumstances that would justify denying an award are narrowly circumscribed so as not to interfere with the Act's remedial private attorney general objectives. *Bonnes* v. *Long*, 559 F.2d 1316, 1319 (4th Cir. 1979).

The District Court's decision to deny an award solely because the Bar proposed an amendment to the unconstitutional Rule flies in the face of this Court's decision, in an earlier appeal, that the Bar proposal does not cause an award to be unjust. At that time, the Supreme Court reviewed a District Court decision to deny an award against the Bar because of these proposed amendments. The District Court, 470 F.Supp. at 1062-1063, had held:

> defendants State Bar and its appropriate officers endeavored to persuade the Supreme Court of Virginia to amend DR 2-102 . . . Despite these entreaties, the Supreme Court of Virginia declined to amend DR 2-102(A)(6). Under these particular facts, it would be unjust to require the state Bar Defendants to pay plaintiffs' attorneys fees.

The Supreme Court rejected this basis for denying fees, concluding "[w]e are not convinced that it would be unfair to award fees against the State Bar . . . Fee awards against enforcement officials are run-of-the-mill occurrence, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction." *Supreme Court of Virginia*, v. *Consumers Union*, 446 U.S. at 739. This Court did add the caveat that an award might be unjust if special circumstances existed that were not revealed in the record. *Id.* It vacated the judgment de-

nying a fee award against the Bar and remanded the case for reconsideration in light of this decision.

On remand, the District Court failed to identify any new special circumstances that had not been disclosed in the record before the Supreme Court. Instead, it denied an award against the Bar for the exact reason this Court had specifically rejected.

The Court of Appeals correctly overruled the District Court's decision and held that an award should have been entered based on the Bar's enforcement powers. The Bar's enforcement efforts played a major role in the infringement of Consumers Union's constitutional rights. It was the Bar that refused to certify the directory as a "reputable publication" attorneys could list in and that informed attorneys the Rule prohibited them from providing any information for the directory. It was the threat of enforcement by the Bar (as well as the Virginia Court) that forced Consumers Union to bring this suit and to incur litigation expenses to defend its rights.

The Bar's wholly separate legislative efforts to amend the Rule have no bearing on the fairness of an award based on the Bar's enforcement role. The Supreme Court established a dichotomy between the legislative and enforcement functions at issue in this case by authorizing a fee award against the Virginia Court based on its enforcement function, but prohibiting an award premised on its legislative decision to issue or amend the Rule. Since a fee award would not be based on these legislative decisions, the Court of Appeals correctly ruled that efforts to influence those legislative decisions did not cause an enforcement-based award to be unjust.

This is especially so because the Bar efforts to amend the Rule were not made until long after this lawsuit was filed. To allow such a tardy response to defeat a fee award would undermine Section 1988's objective of encouraging private attorneys general to bring litigation to vindicate constitutional rights. Here, where the Bar proposal would not even have permitted Consumers Union to publish its directory and would not have protected the First Amendment rights at issue, that tardy effort certainly should not defeat a fee award reimbursing Consumers Union for fees and costs it had to incur to defend its rights.

IV.

CONCLUSION

The Bar fails to raise any issues that require the attention of this Court. The Court of Appeals correctly decided that Consumers Union, the prevailing plaintiff, is entitled to reimbursement for its fees and costs under Section 1988 since there are no special circumstances that cause such an award to be unjust. The Bar's petition for writ of certiorari should be denied.

Respectfully submitted,

Consumers Union of United States Inc. and
Virginia Citizens Consumers Council, Inc.

/s/ Ellen Broadman

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